

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

COLORADO FIRE SPRINKLER, INC,

Respondent,

and

**ROAD SPRINKLER FITTERS LOCAL
UNION NO. 669, U.A., AFL-CIO,**

Charging Party.

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* **Case Nos. 27-CA-115977,**
* **27-CA-120823**
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LOCAL 669’S REPLY TO RESPONDENT’S ANSWERING BRIEF

Charging Party Road Sprinkler Fitters Local Union No. 669, U.A., AFL-CIO (“Local 669” or “the Union”) respectfully submits this Reply for the limited purpose of correcting two (2) major misstatements in the Answering Brief filed by Respondent Colorado Fire Sprinkler, Inc. (“Colorado Fire” or “Respondent”): (i) that Respondent’s failure to make several monthly contributions to the National Automatic Sprinkler Industry Health and Welfare (“NASI”) Fund on a timely basis constituted a complete and overt repudiation of its obligations to that Fund; and (ii) that Respondent “did not give conflicting signals or engage in ambiguous conduct” with respect to its continuing obligation to make contributions to the NASI Fund.

Resp. Answer. Br. at 1. Respondent has attempted to bolster the erroneous

findings by the Administrative Law Judge on these same issues (ALJD at 12) by mischaracterizing them once again in its Answering Brief -- contrary to the undisputed facts of the case.¹

1. Untimely Contributions to the Fund Are Not a Repudiation

The undisputed fact, confirmed by Respondent's witness, is simply that Colorado Fire fell behind in its contractual obligations to make monthly contributions to the NASI Fund under the 2010-13 collective bargaining agreement, a common occurrence in the construction industry (Gessner 44-45). According to the testimony of Respondent's owner, there was a "delinquency" in Colorado Fire's contributions to the NASI Funds that was subsequently remedied when Respondent was able to "catch up the funds through the end of the contract." Stringer 162-63, 202; ALJD at 6.

Respondent's "catching up" with late payments to the NASI Fund was not a negation of Colorado Fire's continuing obligations to the Fund but a recognition of, and an adherence to those obligations – it is the antithesis of any purported "repudiation" of those obligations as Respondent contends and as the

¹ References to the Administrative Law Judge's Decision and Order are cited as (ALJD__); references to the transcript of the hearing are cited herein by witness and page, *i.e.*, "(Gessner __)"; exhibits are referenced as "(GCX __)." Emphasis is supplied herein unless otherwise indicated.

Administrative Law Judge erroneously concluded. Resp. Answer. Br. at 2-3; ALJD at 12.

The same distinction between an employer's mere temporary failure to meet a continuing contractual obligation and a complete repudiation of that obligation has consistently been recognized and applied by the Board for NLRA Section 10(b) purposes (indeed, as recently as last week). *Harry Asato Painting, Inc.*, 362 NLRB No. 104 (2015), slip op. at 11-12 (For Section 10(b) purposes, the NLRB "makes a distinction between 'simple failure to abide by the terms of a collective-bargaining agreement' and 'outright repudiation of the agreement,' or 'total repudiation.'" (Footnote and citations omitted); *Vallow Floor Covering, Inc.*, 335 NLRB 20, 20 (2001) ("...if an employer does not repudiate the contract, but only breaches its provisions, each successive breach constitutes an unfair labor practice unrelated to previous breaches. .. [T]he fact that one or more of the breaches occurred outside the 10(b) period does not bar a complaint alleging contract violations within the 10(b) period.") (Citation omitted).²

² The decision primarily relied upon by Respondent and the ALJ, *Chemung Contracting Corp.*, 291 NLRB 773 (1988), is not to the contrary. In that case, the Respondent "unequivocally repudiated its obligation to make contributions into the trust funds and the Union knew of this action ... and Respondent [did] not engage[] in any conduct that can be construed as inconsistent with the Respondent's initial actions," such as Respondent eventually "catching up" with its prior delinquencies to the NASI Funds in this case. 291 NLRB at 774.

Thus, Colorado Fire's temporary "delinquency" in its contractual obligations to the NASI Fund in early 2013, a failure it subsequently remedied, did not constitute a "repudiation" so as to precipitate the running of the NLRA Section 10(b) period.

2. Respondent's "Contradictory" Conduct

Respondent has parroted the ALJ's erroneous conclusion that it gave the Union the equivalent of timely notice of its unilateral change in health insurance prior to its implementation (ALJD at 12) on the tenuous basis that Colorado Fire "did not give conflicting signals or engage in ambiguous conduct" with respect to its obligations to make contributions to the NASI Fund. Resp. Answer. Br. at 1, 8-9; ALJD at 12.

Indeed, Colorado Fire's ongoing negotiations for a new contract belie any notion that it was repudiating the existing contract and moving forward as a non-union contractor.³ Respondent does not even claim to have given the Union timely and affirmative notification of its unilateral change to the NASI benefit funds with

³ In attempting to manufacture the appearance of timely notice of repudiation to the Union, the Respondent has mischaracterized the ALJ's findings on one important point: in claiming that Respondent's owner "made a number of comments to the Union reflecting an intention to permanently cease operating as a union contractor and making benefit fund contributions," Respondent cites to the ALJD. Not only is there no support for such a statement but the ALJ concluded directly to the contrary. *See* Resp. Answer. Br. at 8; ALJD at 5-6.

a substitution of its own health insurance prior to the *post hoc* notification given at a bargaining meeting in October of 2013 months after the decision had been unilaterally implemented. Stringer 218; GCX 21; ALJD at 7. To be sure, Colorado Fire did make a bargaining proposal for a new insurance plan during a previous bargaining session in June of 2013 (GCX18), but a bargaining *proposal* is hardly the same as a notification that Colorado Fire had decided to unilaterally implement a new health insurance plan and to repudiate its obligations to the NASI Fund.

The undisputed facts prove precisely the opposite of both Respondent's assertion and the ALJ's conclusion. Not only is it undisputed that Respondent never gave *any* affirmative notice to Local 669, "conflicting," "ambiguous," or otherwise, of its intent to repudiate its continuing obligations to the NASI Funds and to implement unilateral changes in health insurance benefits in August of 2013 (ALJD at 7), but, even if it could be said that there was any evidence that Colorado Fire gave the Union "conflicting signals" with respect to its obligations to the NASI Funds, a point we strongly dispute, the Section 10(b) limitation period cannot be said to have begun to run until Respondent gave "clear and unequivocal notice" of repudiation to the Union (ALJD at 12), such as at the parties' October 2013 bargaining session more than a month *after* the unilateral change was implemented. *E.g., Seedorf Masonry, Inc.*, 360 NLRB No. 107 (2014), slip op. at

7 (the burden is on the Respondent to prove “a clear and unequivocal notice” of any purported repudiation).

Indeed, Colorado Fire’s prior delinquency to the NASI Fund obligations refutes rather than supports its contention that the Union had received timely notice -- “[t]he Union could not have anticipated this repudiation at an earlier time (outside the 10(b) period) as Respondent had consistently been late in its payment to the funds.” *Capriccio Restaurant*, 314 NLRB 1267, 1268 (1994).

Conclusion

For the reasons stated, the mischaracterizations of the undisputed facts in Respondent’s Answering Brief should be rejected by the Board, and the Administrative Law Judge’s erroneous Section 10(b) determination reversed.

Date: June 1, 2015

Respectfully submitted,

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Certificate of Service

I hereby certify that on June 1, 2015, I electronically filed Local 669's Reply Brief to Respondent's Answering Brief with the Executive Secretary of the National Labor Relations Board via the e-filing portal on the NLRB's website, and also forwarded a copy by electronic mail to the Parties as listed below:

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